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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOSEPH FOREST,

Defendant and Appellant.

A124144

(Mendocino County
Super. Ct. No. 06-74772)

Defendant Robert Joseph Forest appeals from the court's order denying his petition for a finding of factual innocence (Pen. Code,¹ § 851.8) following the dismissal of the charge of assault with a firearm (§ 245, subd. (a)(2)). He contends that the trial court erred in denying the petition because the evidence established that he acted in self-defense. We affirm.

I. FACTUAL BACKGROUND

The testimony at the preliminary hearing revealed the following facts:

At approximately 5:20 p.m. on November 8, 2006, Jacob Long was driving by the Tip Top Lounge on North Franklin Street in Fort Bragg when he heard some yelling and loud obscenities. Long's car window was open and he looked over and saw two men in an altercation. He saw defendant holding a gun to the head of an African-American man (subsequently identified as Stanley Douglass). Defendant was yelling obscenities at Douglass, and was holding him by the back of his shirt with one hand and had the gun to

¹ All further statutory references are to the Penal Code.

his head with the other. Douglass looked scared. Long recalled defendant telling Douglass, “don’t mess with me” or “don’t fuck with me.” Long thought that defendant was going to kill Douglass. Douglass did not make any threatening gestures and “stood there in shock.” Douglass walked away quickly; defendant got on his motorcycle and left. Long called 911.

Douglass testified that on the day of the incident, he was standing with his friend on the street when defendant walked by. Douglass asked defendant for a cigarette. Defendant responded something other than “no” so Douglass followed him and asked him, “what did you say?” Defendant responded aggressively and said “some profanity.” Defendant then pulled a gun out, and grabbed him. Defendant said something about shooting it. Douglass did not physically threaten defendant in any way and tried to walk away. Defendant pointed the gun at Douglass’s face and then toward his back. Douglass thought that he could have died that day.

Sergeant Mary Ann Miller testified that defendant came to the police station on the morning of November 9, 2006, and gave her his .32 caliber handgun. He told her that he had used the gun the previous evening for self-defense purposes.

The trial court held defendant to answer, finding that the evidence was sufficient to show that defendant committed an assault with a firearm.

Defendant moved to dismiss the information pursuant to section 995, contending that the magistrate erred in excluding the testimony of Sergeant Brandon Lee regarding statements defendant made to Lee, and that the prosecution failed to adduce sufficient evidence at the preliminary hearing because Douglass’s testimony lacked credibility and was contradictory. The court denied the motion, concluding the magistrate’s ruling that Lee’s testimony was not reasonably likely to establish an affirmative defense was proper. The court noted that: (1) there was eyewitness testimony defendant was holding a gun to the victim’s head; (2) substantial evidence supported the magistrate’s determination of credibility, and (3) in any event, it would not substitute its judgment as to the weight of the evidence for that of the magistrate.

On January 18, 2008, the People moved to dismiss the complaint on the ground of insufficient evidence. The court granted the motion.

On October 7, 2008, defendant petitioned for a finding of factual innocence pursuant to section 851.8. In support of the petition, he submitted his declaration setting forth his version of the incident in which he averred that Douglass grabbed his jacket and demanded a cigarette. Defendant responded by telling him that his conduct was a crime and could get him hurt. Defendant said that Douglass followed him and yelled that he was going to “f--- [defendant] up” and said he was a gang-banger from San Francisco. Defendant became apprehensive and when Douglass placed his hand behind his back, defendant, in fear for his life, drew his pistol to make Douglass back off. Defendant also submitted the declaration of Stephen Soria who stated that he witnessed the incident. He averred that he saw an African American man approach defendant, tug on his jacket, and ask him for a cigarette. Defendant said “no” and pushed the African-American man away. The African-American man followed defendant and they exchanged words. Defendant told the African-American man to get away from him. Defendant reached into his jacket pocket, pulled out a small pistol, and pointed it at the African-American man. They struggled for a few seconds before defendant backed away, put the gun back in his pocket, and walked back to his motorcycle.

The court denied the petition, finding that the People presented substantial evidence that reasonable cause existed to believe that defendant assaulted Douglass with a firearm, and that defendant did not act in self-defense.

II. DISCUSSION

Section 851.8, subdivision (c), provides in pertinent part that “[i]n any case where a person has been arrested, and an accusatory pleading has been filed, but where no conviction has occurred, the defendant may, at any time after dismissal of the action, petition the court that dismissed the action for a finding that the defendant is factually innocent of the charges for which the arrest was made.” In considering the petition, the court applies an objective standard and may consider any evidence relied upon to arrest and charge. (*People v. Medlin* (2009) 178 Cal.App.4th 1092, 1101-1102 (*Medlin*).)

“ ‘[Section 851.8] permits those petitioners who can show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action—to purge the official records of any reference to such action.’ ” (*People v. Adair* (2003) 29 Cal.4th 895, 905 (*Adair*).) “A finding of factual innocence ‘shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.’ (§ 851.8, subd. (b)).” (*Medlin, supra*, 178 Cal.App.4th at p. 1101.) “[T]he record must exonerate, not merely raise a substantial question as to guilt.” (*Adair, supra*, 29 Cal.4th at p. 909.)

“A person petitioning for a finding of factual innocence has the initial burden to demonstrate the absence of reasonable cause. To meet this burden, the petitioner must show more than a viable defense to the crime. He or she must establish, ‘ “that there was no reasonable cause to arrest him in the first place.” ’ [Citation.] If this burden is met, the burden shifts to the prosecution to demonstrate the existence of reasonable cause. [Citation.]” (*Medlin, supra*, 178 Cal.App.4th at p. 1102.) Reasonable cause is a well-established legal standard, “ ‘ “defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime.” ’ [Citations.]” (*Adair, supra*, 29 Cal.4th at p. 904.)

“We apply an independent standard of review and consider the record de novo to decide whether reasonable cause exists to believe that the person arrested committed the crime charged. ‘[A]lthough the appellate court should defer to the trial court’s factual findings to the extent they are supported by substantial evidence, it must independently examine the record to determine whether the defendant has established “that no reasonable cause exists to believe” he or she committed the offense charged. (§ 851.8, subd. (b)).’ [Citation.]” (*Medlin, supra*, 178 Cal.App.4th at p. 1101.)

Defendant contends that the trial court erred in denying his petition for a finding of substantial evidence because the evidence does not support the trial court’s finding that he did not act in self-defense. He argues the People failed to disprove his claim of self-defense.

Defendant misunderstands the legal standard for determining factual innocence. On a petition for a finding of factual innocence, defendant bears “the initial burden of proof . . . to show that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made.” (§ 851.8, subd. (b).) Therefore, defendant had the initial burden of proving that there was no reasonable cause to arrest him in the first place. (See *Medlin*, *supra*, 178 Cal.App.4th at p. 1102; *People v. Bleich* (2009) 178 Cal.App.4th 292, 300.)

Based on the record, there are several objective factors which justified defendant’s arrest. (See *Adair*, *supra*, 29 Cal.4th at p. 905.) First, the evidence at the preliminary hearing established that defendant pulled a gun out and pointed it at Douglass’s head. Second, Douglass did not have a gun or any kind of weapon. Third, Long, who observed part of the incident, testified that defendant yelled obscenities at Douglass, and held on to his shirt while he pointed the gun to Douglass’s head. Fourth, Long observed that Douglass was frightened and that he at no time made threatening gestures toward defendant. Finally, defendant left the scene of the incident and did not wait for the police to arrive.² Given this evidence, there was reasonable cause to arrest defendant.³

While defendant argues that he used the gun in self-defense because he was being pursued by Douglass and saw him reach behind his back, thus causing him to be apprehensive, defendant’s self-serving declaration does not establish that he was factually innocent of the charge. Moreover, in view of the testimony of both Long and Douglass at the preliminary hearing, the evidence demonstrated that defendant did not act in self-defense but rather that defendant was the aggressor and confronted Douglass with the gun

² The district attorney learned after the incident that defendant had prior convictions for violating section 12025, subdivision (b) (carrying a concealed firearm) and section 12031 (carrying a loaded firearm in a public place) while Douglass had no reported record of violence.

³ We note that Soria’s declaration, submitted by defendant in support of the petition, also supports the People’s action in filing the complaint against defendant. Soria averred that he witnessed part of the incident and acknowledged that defendant pulled out a small pistol and pointed it at Douglass.

simply because Douglass argued with defendant. Accordingly, the record provides strong evidence from which a reasonable person of ordinary care and prudence would believe defendant committed the offense—assault with a firearm—for which he was arrested and charged. (See *Adair*, *supra*, 29 Cal.4th at p. 904.)

Defendant argues that evidence disclosed subsequent to the preliminary hearing concerning Douglass’s “history of violence,” shows Douglass precipitated the confrontation resulting in defendant’s need for self-defense, and that the evidence conclusively established defendant’s factual innocence. It is true that, “notwithstanding probable cause to arrest, facts subsequently disclosed may establish the defendant’s innocence.” (*Adair*, *supra*, 29 Cal.4th at p. 905, fn. 4.) Here, however, the new facts alleged fail to establish that defendant was factually innocent of the charge against him. To the contrary, the court properly sustained the People’s objections to the evidence proffered by defendant that Douglass had a history of violence.⁴ And, the trial court is not required to accept as true defendant’s declaration that he acted in self-defense when he saw Douglass reach behind his back. (See *People v. Perry* (1963) 220 Cal.App.2d 841, 845.) In any event, defendant’s declaration is at odds with eyewitness testimony by both Long and Soria who stated they saw defendant point the gun at Douglass but said nothing about Douglass’s reaching behind his back. Moreover, Long’s testimony at the preliminary hearing that defendant was holding onto Douglass while pointing the gun at his head undermines defendant’s claim that his actions were justified in self-defense.

In sum, defendant failed to establish that there was no reasonable cause to arrest him for assault with a deadly weapon in the first instance. The court properly denied his petition for a finding of factual innocence.

⁴ The court sustained the People’s hearsay, lack of personal knowledge, and bias objections to the declarations of David E. Paoli and the interview report of Joseph Sheehan which defendant submitted in support of his petition. Paoli alleged that Douglass had threatened his son with a maul and “some gang members.” Sheehan stated that Douglass had a “ ‘rage issue’ ” and “ ‘picks fights’ ” when he is “ ‘off his meds.’ ”

III. DISPOSITION

The order is affirmed.

RIVERA, J.

We concur:

REARDON, Acting P.J.

SEPULVEDA, J.